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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1372

In the Matter of:

ALDON KEITH KENTNER,

Petitioner,

v.

SEABOARD COAST LINE RAILROAD COMPANY and THE SEACOAST TRANSPORTATION COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

The Petitioner, Aldon Keith Kentner, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the District Court of Appeal of Florida, Second District, entered in this proceedng on June 6, 1973. References are to the Appendix included as a part of this Petition.

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Second District, appears at 278 So.2d 637. (A. 1) The memorandum decision of the Florida Supreme Court denying petitioner's petiton for Writ of Certiorari on October 16, 1973, and denying petitioner's petition for rehearing on December 12, 1973, appears

at 285 So.2d 614. (A. 2) The final summary judgment of the Circuit Court of the Thirteenth Judicial Circuit of Florida is unreported and appended hereto (A. 3). The order of the Thirteenth Judicial Circuit granting respondent's motion to strike affidavit and stipulation concerning statements made during hearing on defendant's motion for summary judgment and denying plaintiff's motion for summary judgment and denying plaintiff's motion for rehearing is unreported and appended hereto (A. 5).

JURISDICTION

The judgment and opinion of the District Court of Appeal of Florida, Second District, was entered on June 6, 1973. A timely petition for Writ of Certiorari was filed with the Florida Supreme Court and was denied on October 16, 1973. A timely petition for rehearing was filed with the Florida Supreme Court and was denied on December 12, 1973. This petition for certiorari was filed within 90 days of the denial of the petition for rehearing by the Florida Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the rule announced by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), that a party releases only those he intends to release, permits a railroad that was neither named in nor a party to a release to utilize such release as a defense to an action brought under the Federal Employers' Liability Act, despite proffered evidence that the Railroad was not intended to be a beneficiary of the release.

2. Whether the rule announced by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), that the Parol Evidence Rule operates only as to the parties to a document, permits a railroad that is a stranger to a release, to invoke the Parol Evidence Rule to exclude evidence of the intent of the party giving the release in an action brought under the Federal Employers' Liability Act?

STATUTORY PROVISIONS INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. §§51, et. seq. The full text of the Act is appended hereto. (A. 6-9)

STATEMENT OF THE CASE

This case involves an action for personal injuries by the petitioner, Aldon Keith Kentner (hereinafter "Kentner"), against the Seaboard Coast Line Railroad Company and the Seacoast Transportation Company (hereinafter "Railroad") under the Federal Employers' Liability Act (hereinafter "FELA").

Petitioner was an employee of the Railroad and on November 30, 1967, during the course of that employment, he was called upon by the Railroad to assist in the loading of certain rugs at the warehouse of W. J. Smalley (hereinafter "Smalley"), in Tampa, Florida. The petitioner was injured while engaged in such work at the Smalley warehouse.

In 1969, petitioner filed a negligence action against Smalley and Smalley's insurance carrier, Royal Indemnity Company, for petitioner's injuries resulting from Smalley's negligence. On October 30, 1970, incident to

the settlement of that action, petitioner executed a *pre-printed release form,* a copy of which is appended hereto (A. 11). The pre-printed release was executed by the petitioner and was in favor of the Royal Globe Insurance Company, Smalley Transportation Company and W. J. Smalley, who were the defendants in that action. The $24,000.00 paid for the settlement of the Smalley case was paid by the defendants in the Smalley case and not by the Railroad, which was not a party to that case. *The railroad was not a party to the pre-printed release and was not named in the release.*

In 1970, petitioner filed a complaint against the Railroad and thereafter filed an amended complaint alleging that petitioner was injured as a result of the negligence of the Railroad in failing to provide him with a safe place to work or proper assistance or safeguards and that petitioner was entitled to recovery under the FELA. A copy of the amended complaint is appended hereto (A. 10).

The Railroad answered and set up certain defenses, including the Fifth Defense that the petitioner had filed a separate suit against Smalley, had settled that suit for the sum of $24,000.00 and released Smalley; and if any liability of Smalley were imputed to the Railroad, petitioner's action against the Railroad was barred by the release of Smalley. (A. 13-18) The Railroad thereafter filed a third-party complaint, and amendments thereto, against Smalley (A. 19-26) contending that Smalley's was the primary and active negligence, demanding indemnification, claiming that the Railroad had received an assignment from the petitioner of the monies which the Railroad had advanced for hospital and medical expenses and demanding judgment therefor. On January 10, 1972, the Railroad filed amendments

to its answer setting up as a Ninth Defense that its negligence, if any, was secondary or passive and that petitioner's release of his claim against Smalley barred petitioner's recovery against the Railroad. (A. 26-27)

The Railroad moved for summary judgment based only upon the pleadings and an admission by petitioner that the release he had executed in favor of Smalley and Royal Globe was genuine. No affidavits were attached to the Railroad's motion. The summary final judgment for the Railroad determined: (A. 3)

> [T]hat there is no genuine issue as to the material fact that, on or about October 30, 1970, and after the plaintiff's claim in this action accrued, the plaintiff released the defendants and all other persons, firms and corporations from it, by executing, acknowledging and delivering a written instrument entitled 'RELEASE OF ALL CLAIMS' in connection with the settlement of another suit pending in this Court, to wit, No. 179833, wherein Aldon Keith Kentner was plaintiff and W. J. Smalley, et al, were defendants.
>
> b. The defendants are entitled to a judgment as a matter of law in connection with the Fifth Defense and Ninth Defense set forth in the answer of defendants as amended, wherein the defendants have pleaded the said release as a bar to recovery in this action.

Petitioner then moved for a rehearing, pointing out that the court had failed to consider, "the intention of the parties to the release." The motion for rehearing, a copy of which is appended hereto (A. 28), specifically called the lower court's attention to this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), and the Fifth Circuit's decision in *Cates v. United States,*

451 F.2d 411 (5th Cir. 1972). The petitioner supported his motion by attaching an affidavit of his trial counsel as well as a stipulation between that counsel and counsel for the third-party defendants (A. 29 and 30). The affidavit of petitioner's counsel, Mr. Hapner, sets forth in material part that:

> [H]e was counsel for plaintiff herein in the former case of *Kentner v. Smalley et al,* . . . and that when the release plead by the defendant in the within cause, was executed by his client, it was his intention as well as that of his client as previously stated to counsel for defendant, W. J. SMALLEY, to file the within cause of action against the railroad defendant and that it was considered by counsel for plaintiff that the Florida Statutes clearly provided that the execution of the release would not release any claim against the railroad defendant and said advice was given to the plaintiff, herein, at that time.

The stipulation between petitioner's trial counsel and counsel for third-party defendant, Smalley, sets forth in material part: (A. 30)

> [T]hat during the hearing on the Motion for Summary Judgment filed in this cause by the Defendant/Third Party Complaint, Seaboard Coast Line Railroad Company, the attorney for the Plaintiff stated to the Trial Judge that it was not the intention of the Plaintiff to release his claim against the Railroad when the Release in issue was executed. Then, when the undersigned attorney for Smalley and Royal Globe was asked about his intention in obtaining the Release, the undersigned attorney stated that it was his intention to obtain a full Release in favor of his clients and he not know [sic] who all would be released through Mr. Kentner's execution of the Release in issue.

The Railroad moved to strike the affidavit and stipulation as, *inter alia,* attempts to "vary the terms and provisions of the written release" and because "all prior negotiations and agreements . . . were merged in the final release . . . ." (A. 31) The trial court's order of March 23, 1973, struck the affidavit and stipulation and denied the motion for rehearing. (A. 5)

On appeal of the adverse summary judgment ruling, petitioner presented the District Court of Appeal of Florida, Second District, with, *inter alia,* the following points of law:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT, BASED ON A DEFENSE OF RELEASE, TO DEFENDANTS WHO HAD NOT SIGNED AND DID NOT DEMONSTRATE THAT THEY WERE INTENDED TO BE BENEFITED BY THAT RELEASE.
>
> • • •
>
> B. Under Federal Law, A Release Discharges Only Those Persons Intended By The Parties Thereto To Be Released.
>
> C. The Parol Evidence Rule Is Not Applicable.

On June 6, 1973, the Second District Court of Appeal filed its two-sentence per curiam affirmance, saying:

> One or two of the points raised on appeal at first gave us pause, but after having carefully considered those points and having meticulously reviewed the record herein we conclude that no reversible error has been made to appear. Accordingly, the judgment appealed from should be, and it is hereby, affirmed. (A. 1)

On the points of law raised on appeal, the Second District Court's two-sentence per curiam affirmance holds that under the federal law governing FELA actions the release in question discharged a *stranger* without a showing that the release was so intended; and that a stranger to a release in a FELA action may invoke the Parol Evidence Rule to prevent parties to a release from establishing the intent of the release.

The petitioner timely filed in the Florida Supreme Court a petition for a Writ of Certiorari to the District Court of Appeal on the grounds that the District Court of Appeal's decision conflicted with other Florida decisions requiring the application of federal law in FELA cases and conflicted with Florida decisions regarding the receipt of affidavit evidence on a motion for rehearing after grant of a final summary judgment. The Florida Supreme Court, in a 4-3 decision without opinion, denied the petition for Writ of Certiorari and thereafter denied the petition for rehearing. (A. 2)

REASONS FOR GRANTING THE WRIT

1. *The State Court Decision Below Is Contrary To The Humanitarian And Remedial Purposes Of The FELA And Is In Direct Conflict With This Court's Decision In* Zenith v. Hazeltine Research, Inc., *401 U.S. 321 (1971). The Decision Below Seriously Restricts A Plaintiff's Rights Under The FELA By Permitting A Stranger To Invoke The Protection Of A Release In Which The Stranger Is Neither Named, Nor To Which The Stranger Is A Party.*

This Court has consistently held that the FELA was enacted for remedial and humanitarian purposes, and is to be construed liberally to fulfill those purposes. *E.g., Urie v. Thompson,* 337 U.S. 163, 181-2 93 L.Ed. 1282, 1299 (1949), and *Jamison v. Encarnacion,* 281

U.S. 638, 640, 50 S.Ct. 440, 74 L.Ed. 1082, 1085 (1930). This Court has also observed that since the Congress enacted the FELA in broad, general terms, there was placed upon the courts "the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. . . . [I]t is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 2 L.Ed.2d 382, 388 (1958). In *Sinkler v. Missouri Pacific R. R. Co.*, 356 U.S. 326, 329-30, 78 S.Ct. 758, 2 L.Ed.2d 799, 802-03 (1958), this Court again stated some of the broad policy considerations governing FELA actions:

> [I]n interperting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law, [citation omitted], was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. [citation omitted]. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. [citation omitted]. The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting 'the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden.' S Rep No. 460, 60th Cong, 1st Sess 3.

It is clear that the FELA's policy is to protect the comparatively helpless railroad employees when they are injured, and to permit such employees to proceed in their actions against railroads in a manner that is

relatively free of the hypertechnical quiddities of the common law.

The foregoing philosophy is well illustrated by the Court's decision in *Dice v. Akron, Canton & Youngstown R. R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952), where the Court had before it a FELA case in which the validity of a release was a question. Pointing out the importance of releases in FELA litigation, and holding that in such cases the validity of a release is a *federal question,* the Court reasoned (342 U.S. at 361-62, 96 L.Ed. at 403):

> Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. [citation omitted]. *Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration.* [citation omitted]. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law. [emphasis added]

Second. In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. *Application of so harsh rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.* [emphasis added]

From this Court's decisions in *Urie, Jamison, Kernan, Sinkler,* and *Dice, supra,* construed with this Court's more recent decision in *Zenith v. Hazeltine, infra,* the following considerations emerge:

1. The policy implicit in the FELA is that a railroad will take precautions with regard to employee safety if there exists a statutory policy of liability.

2. Railroad employees, like seamen, are preferred statutory beneficiaries under federal law.

3. On its face it violates the Act to permit a railroad to get a free ride by being released without paying anything to its injured employee.

4. Since federal law says that a party releases only those he intends to release, *(Zenith v. Hazeltine, infra)* and since the policy of the FELA is one of protecting the comparatively helpless railroad employee, the intention of a release given under the FELA should be demonstrated in an iron-clad way, and if the railroad claiming the benefit of the release is not named in the release, the policy of the FELA demands that parol evidence be admitted to determine the intention of the railroad employee giving the release.

In the present case, the trial court and the District Court of Appeal applied the common law rule that a release of one joint tortfeasor was a release of all.[1]

[1] Ironically, Fla. Stat. §768.041(1), first enacted in 1957, abrogated the common law rule in Florida: "A release or covenant not to sue as to one tort-feasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tort-feasor who may be liable for the same tort or death." Thus, the Florida courts denied the petitioner the benefit of a rule which is in full effect in Florida as to state law claims and which should be in effect in Florida as to FELA claims.

These holdings are patently contrary to the federal doctrine set forth by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). Hazeltine contended that Zenith's release given to certain other companies (but not to Hazeltine) precluded an antitrust claim against Hazeltine. This Court rejected that contention and held that the effect of a release upon a tortfeasor not a party to the release is to be determined in accordance with the *intention of the parties to the release,* and that a party releases only those persons whom he intends to release. This Court specifically rejected the older rules that a release of one joint tortfeasor released all other parties jointly liable, or that a release without an express reservation of rights constituted a release of all tortfeasors and co-conspirators. The Court noted that although it had applied the common law rule in actions where rights arose under state or federal common law (401 U.S. at 344, 28 L.Ed.2d at 95),

> we are cited to no case where we have applied the rule to a statutory cause of action created under Federal law. Indeed, we have expressly repudiated the rule. See Arrow Mfg. Co. v. Convertible Top Co., 377 U.S. 476 501, 12 L.Ed.2d 457, 477, 84 S.Ct. 1526 (1964). Cf. Birdsell v. Shaliol, 112 U.S. 485, 489 L.Ed. 768, 769, 5 S.Ct. 244 (1884).

Discussing the rule ultimately adopted, the Court found (401 U.S. at 345, 28 L.Ed.2d at 96):

> A final rule, which has gained support in several recent decisions and been adopted by the American Law Institute in a tentative draft of the Second Restatement of Torts, provides that the effect of a release upon co-conspirators shall be determined in accordance with the intentions of the parties. See Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co. 232 F Supp 556, 561-563 (ND

Cal 1964), rev'd Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc., supra; Young v. State, 455 P2d 889 (Alaska, 1969); Breen v. Peck, 28 NJ 351 146 A2d 665 (1958); Restatement (Second), Torts §885(1) (Tent. Draft No. 16, 1970); 12 Vand L Rev 1414, 1416-1417 (1959).

This Court also said (401 U.S. at 347, 28 L.Ed.2d at 97):

> To adopt the ancient common-law rule would frustrate such partial settlements, and thereby promote litigation, while adoption of the First Restatement rule would create a trap for unwary plaintiffs' attorneys. *The straightforward rule is that a party releases only those other parties whom he intends to release.* Our conclusion that this is the appropriate rule for giving effect to releases under the antitrust laws is further buttressed by the Restatement's abandonment in a tentative draft of the rule requiring express reservation of rights in order to save them, and its adoption of the rule to which we adhere. See Restatement (Second), Torts §885, Comments a-d (Tent. Draft No. 16, 1970).
> [emphasis added]
>
> • • •
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> We accordingly have no hesitancy in holding that HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not now entitled to the benefits of that release.

In rejecting the common law rule the Court expressly relied upon *Young v. State,* 455 P.2d 889 (Alaska 1969), in which the release contained language strikingly similar to the release executed by the petitioner herein. In *Young,* the document purported to release the named beneficiaries as well as "all other persons, corporations, firms, associations or partnerships . . . ." The present release (A. 11), in addition to releasing its named beneficiaries, purports to release "any other per-

son, firm or corporation charged or chargeable with responsibility or liability, their heirs, representatives and assigns . . . ." The Alaska court ruled that the effect of a release would be limited to those beneficiaries specifically named therein, and this Court expressly relied upon that decision in *Hazeltine.*

The *Hazeltine* decision was rendered in the context of an antitrust action; however, in a subsequent Fifth Circuit decision, *Cates v. United States,* 451 F.2d 411 (5th Cir. 1971), the court applied the *Hazeltine* rule to a seaman's personal personal injury claim against the United States. In *Cates,* Chief Judge Brown expressly recognized that the *Hazeltine* approach to the construction of releases was broadly applicable to claims of releases of rights arising under federal statutory and nonstatutory law. (451 F.2d at 415):

> While it is true that the [*Hazeltine*] Court was speaking immediately of statutory claims (patent and antitrust) *everything said points to a like approach in Federal question claims whose policies and traditions are as readily indentifiable.* [emphasis added]
>
> * * *
>
> Case law and *a complex of Federal legislation concerning employment, and working and safety conditions* reflect a commitment to the policy that allowance of money damages to those harmed by violations of these standards serves the dual purpose of (i) ameliorating the harm and (ii) encouraging other (by deterrence) to take effective preventive steps. For such cases, *the Hazeltine approach is most consistent with the aims and purposes of the damages remedy.* [emphasis added]

The protective policy of the FELA requires application of the *Hazeltine* and *Cates* rule that a release is effective only as intended by the parties to the release. The Florida trial court and District Court of Appeal chose to ignore the humanitarian underpinnings of the FELA, and ignored the *Hazeltine* and *Cates* holdings in permitting the Railroad, *which was a stranger to the pre-printed release, which made no contribution to the settlement, and which was not intended to be benefited by the release,* to set up the release as an absolute defense to the petitioner's FELA action. The Florida holdings completely defeated the federal rights guaranteed to petitioner by the FELA. Because releases in FELA cases are so important to the administration and liquidation of claims under the Act, and are so important to the achievement of the humanitarian and remedial purposes of the Act, the restrictive approach of the Florida courts should not be allowed to stand.

2. *The State Court Decision Below Is In Direct Conflict With This Court's Decision In* Zenith Radio Corp. v. Hazeltine Research, Inc., *401 U.S. 321 (1971), Because It Permits A Stranger To A Written Release In A FELA Case To Invoke The Parol Evidence Rule To Exclude Evidence Of The Intention Of The Parties To The Release As To The Effect Of The Release.*

The trial court struck petitioner's proffered evidence on the issue of the intent of the parties to the release, and cited the Parol Evidence Rule in support of its order. (A. 5-6). The Railroad invoked the Parol Evidence Rule even though the Railroad is neither named in, nor a party to, the release in question. This Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 277 (1971), is also dispositive of this issue. In Footnote 12, the Court expressly held (401 U.S. at 347, 28 L.Ed. at 97):

> Resort may be had to the contract in construing the release since *the parol evidence rule is usually understood to be operative only as to parties to a document, and HRI here was not a party to the release.* See Stern v. Commissioner, 137 F.2d 43, 46 (CA 2 1954); O'Shea v. New York, C. & St. L. R. Co., 105 F. 559, 562-563 (CA 7 1901); Restatement (Second), Torts §885, Comment d (Tent. Draft No. 16, 1970). See generally 9 J. Wigmore, Evidence §2446 (3d ed 1940). [emphasis added]

The Restatement's revised comment d to §885, upon which *Hazeltine* expressly relied, states:

> The agreement as to the effect of the release may be proved by external evidence; and *the objection of the parol evidence rule is met by the fact that the second tortfeasor who raises the question is not a party to the instrument.* [emphasis added]

Accordingly, the Second District Court's opinion sustaining the lower court's use of the Parol Evidence Rule to exclude evidence of the true intent of the parties to the release is in direct conflict with this Court's decision in *Zenith v. Hazeltine, supra,* and the vast majority of jurisdictions which have considered the point. *See generally,* Annotation, *Applicability Of Parol Evidence Rule In Favor Of Or Against One Not A Party To Contract Of Release,* 13 A.L.R.3d 313 (1967).[2]

Permitting the Railroad, which was not named in, nor a party to, the release in question, to invoke the Parol Evidence Rule to bar evidence of the intent of the

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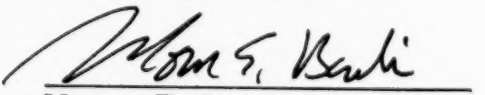
[2] Another point of irony is that in Florida it is equally well settled that only the parties to a contract, or their privies, may invoke the Parol Evidence Rule. A stranger to the instrument cannot. *Roof v. Chattanooga Woodsplit Pulley Co.,* 36 Fla. 284, 18 So. 587 (1895); *Palmer v. R.S. Evans, Jacksonville, Inc.,* 81 So.2d 635 (Fla. 1955); *Bessemer Properties v. Barber,* 105 So.2d 895 (2d D.C.A. Fla. 1958).

parties to the release destroyed the petitioner's rights under the FELA, is in conflict with *Hazeltine, supra,* and conflicts with most jurisdictions that have considered the point. The Florida decision is contrary to the spirit of FELA, and cases construing it, and cannot be permitted to stand.

CONCLUSION

The decision of the trial court, as sustained by the District Court of Appeal of Florida, Second District, is impermissibly restrictive of the rights guaranteed to the petitioner by the FELA and this Court's prior decisions construing the Act. Because of the importance of releases in the administration of the Act, and the flagrant conflict with this Court's *Hazeltine* decision, a Writ of Certiorari should issue to review the judgment and opinion of the District Court of Appeal of Florida, Second District.

Respectfully submitted,



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